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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 52224/294510	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)] on <u>via fax, 571.273.8300 on 09/28/2005.</u> Signature <u>Maggie Gately</u> Typed or printed name <u>Maggie Gately</u>		Application Number 09/833,219 First Named Inventor Klinker Art Unit 2662	Filed April 10, 2001 Examiner Saba Tsegaye
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a notice of appeal. The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the <input type="checkbox"/> applicant/inventor. <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/98) <input checked="" type="checkbox"/> attorney or agent of record. 50,409 Registration number _____ <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____		Signature <u>Leroy M. Toliver</u> Typed or printed name 404.815.6483 Telephone number September 28, 2005 Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.			
<input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.			

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Patents

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:)
Klinker, et al.) Art Unit: 2662
Serial No.: 09/833,219) Examiner: Saba Tsegaye
Filed: April 10, 2001)
For: System and Method to Assure Network)
Service Levels with Intelligent Routing)

Pre-Appeal Brief Request for Review

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Included below is a concise summary of arguments for which this review is requested.

Reasons for Requesting Review

The Examiner's rejections in the most recent Office Action, as well as the earlier rejections in the previous office action, omit essential elements required to establish a prima facie rejection; namely, the examiner has not provided a reference that teaches or suggests at least the claim limitations of "examining a packet header of a first packet that has been routed along a first path to the destination to determine data flow characteristics of the first path" or of "examining a first plurality of packet headers for a first plurality of packets that have been routed to the destination along a first path to determine data flow characteristics for each of the first packets along the first path." Because of this clear factual deficiency in the rejections, the Applicant requests this panel review.

Remarks

In the third Office Action mailed March 28, 2005, the Examiner rejected independent claims 28, 31, and 32 and all corresponding dependent claims over *Ben Nun et al.* (US 6,831,893). While the *Ben Nun* reference was new, the rejection and cited portions of the reference teach a method of using packet header information that is essentially the same as that described in *Bertin*, which the Examiner previously relied upon in rejecting the claims.

For example, the examiner cites several passages from *Ben Nun* as meeting the first claim element of claim 28, namely "examining a packet header of a first packet that has been routed along a first path to the destination to determine data flow characteristics of the first path," and similarly as meeting the first claim element of claim 31, namely "examining a first plurality of packet headers for a first plurality of packets that have been routed to the destination along a first path to determine data flow characteristics for each of the first packets along the first path." See Office Action mailed March 28, 2005, pages 2-4.

Just like the references to *Bertin* in the previous Office Action mailed May 13, 2004, the cited portions of *Ben Nun* simply describe looking at a packet header to make some type of prospective routing decision for the packet whose header is being examined based on explicit instructions or data in the packet header such as a requested Quality of Service or an identified destination. See, e.g., *Ben Nun* column 6, lines 24-46 and column 8, line 50 to column 8, line 14. For example, column 6, lines 24-45 teach extracting data from the packet headers in order to classify the packet into a data flow by evaluating the source IP address and destination IP address. As in *Bertin*, this is done in order to expedite routing of the particular packet whose header information is analyzed.

As was explained in the Response to Office Action filed October 18, 2004 (2nd Response), identifying packet header information for purposes of making a routing decision for the packet whose header is being analyzed differs significantly from examining a first plurality of packet headers to determine flow characteristics for each of the first packets along the first path as claimed in the present application. See 2nd Response page 11. For example, when examining a packet header to determine flow characteristics for each of the first packets along the first path, the flow characteristics are inferred retrospectively by such calculations as time deltas, percent package loss, etc. But when examining a packet header to make prospective routing decision for that packet, as is the case with the methods described in the cited references, there is no attempt to identify from the packet header information indicating the performance metrics of the first path, i.e. the path the packet has already traveled down, but instead to identify information such as IP source address or a destination address that is merely indicative of what should be done in routing that particular packet. See, e.g., 2nd Response pages 11-12; *Bertin*, columns 7 and 12; *Ben Nun*, column 7, line 37 to column 8, line 37.

The distinction between the claims and the cited portions of *Ben Nun* can be seen in that the packet header information identified in *Ben Nun* cannot be used to "rout[e] a second packet to the destination along the optimized path," where the optimized path determined by "comparing the data flow characteristics of the first path to data flow characteristics of a second path to determine an optimized path" as required in claim 28; or used to form an aggregate service level based on the traffic flow that can be used to "rout[e] a packet to the destination based at least in part on the aggregate service level" as required in claim 31. See 2nd Response pages 7-9 (discussing the same distinction in reference to *Bertin*).


No amendments have been made to the claims since the response to the second Office Action. See 2nd Response pages 7-9. These amendments clarified that the data flow characteristics identified in the first packet are used to determine data flow characteristics for the first path that can be used in conjunction with data flow

characteristics for other paths in subsequent routing decisions for other data packets, and not to determine a requested service level or to otherwise facilitate routing of the first packet as described in *Bertin* or *Ben Nun*. See 2nd Response pages 11-12.

As discussed above, both the previous *Bertin* reference and the more recent *Ben Nun* reference merely disclose examining a packet header for prospective routing decision and simply do not contain any disclosure to read on the claim elements of the present application that require identifying data flow characteristics corresponding to the first path which can be used to route a "second packet to the destination" or to "rout[e] a packet to the destination based at least in part on [an] aggregate service level" formed from the data flow characteristics. Because these limitations are not present in any of the cited references, the Examiner has not established a prima facie rejection of the claims containing these limitations.

In light of the above, allowance of the pending claims is respectfully requested.

Respectfully submitted,


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